

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PEDRO CORDERO)	
Claimant)	
VS.)	
)	Docket No. 1,048,277
NATIONAL CARRIERS, INC.)	
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the October 19, 2011, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Workers Compensation Board heard oral argument on February 17, 2012, in Wichita, Kansas. At oral argument the parties stipulated that claimant suffered a 6% permanent functional impairment to the left lower extremity, but did not stipulate at what level of the left lower extremity the impairment existed.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the October 19, 2011, Award, ALJ Fuller found claimant sustained permanent impairment to his left foot and back as a result of an October 9, 2009, work-related accident. The ALJ awarded claimant permanent partial disability benefits based upon a 7% whole body functional impairment. ALJ Fuller also found claimant was not entitled to a work disability as claimant admitted he does not have the legal status necessary to be

employed in the United States. The ALJ noted that issue was currently pending before the Kansas Supreme Court.

Claimant requests the Board reverse the ALJ's denial of a work disability award and grant claimant an award for a 50% work disability based upon a 100% wage loss and a 0% task loss. Claimant requests the Board affirm the remainder of the Award.

Respondent requests the ALJ's finding of a 7% whole body functional impairment be vacated and that claimant be awarded permanent partial disability benefits based upon a 6% functional impairment to his left foot. If the Board upholds ALJ Fuller's finding that claimant has a 7% whole body functional impairment, respondent asks the Board to find that claimant is not entitled to an award based upon a work disability because he cannot be employed legally in the United States.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's disability?
 - A. At what level of the left lower extremity did claimant sustain his 6% permanent impairment?
 - B. Did claimant suffer a low back injury by accident on October 9, 2009, arising out of and in the course of his employment? If so, what is the percentage of permanent impairment?
2. Does the fact that claimant does not have the legal status to be employed in the United States preclude him from being entitled to a work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On Friday, October 9, 2009, while working for respondent, claimant was washing a semitrailer when he slipped and fell on his left side. Claimant is a Spanish-speaking Hispanic and does not speak English. Respondent admits claimant injured his left foot as a result of the accident and also admits claimant has a 6% permanent impairment to the left foot. Claimant testified that two or three days after he fell, his lower back began hurting. On Monday, October 12, 2009, claimant reported the injury to his supervisor, who does not speak Spanish. Claimant used gestures and the help of a co-worker who speaks broken English to tell the supervisor about the fall. Based upon claimant's gestures, the supervisor looked at claimant's left leg.

The following week after the accident, claimant filled out an accident report with a different supervisor, Dana Bramwell. Claimant admitted that he did not tell Mr. Bramwell about the back problems because he wanted to keep working. Claimant was afraid of losing his job.¹

Claimant testified that he saw Danny D. Briggs, a physician assistant at Western Plains Medical Complex (Western Plains), on October 12, October 21 and November 9, 2009. Claimant was sent to Mr. Briggs by respondent. During each of claimant's three appointments, Mr. Briggs only examined claimant's left foot. Mr. Briggs ordered x-rays, which revealed no broken bones. After the first visit, Mr. Briggs diagnosed claimant with a left ankle and foot sprain and a contusion. After the October 21, 2009, visit the diagnosis was changed to ankle sprain resolved, left contusion resolved. On November 9, 2009, the diagnosis was changed to a small left shin contusion and right knee pain unrelated to the accident.

Initially, claimant testified that he reported the sore back each time he saw Mr. Briggs. Sometime after October 12, 2009, claimant filled out paperwork concerning the accident. Claimant testified Mr. Briggs would not examine his back because there was nothing in the report about the injured back. On November 12, 2009, claimant filed his Application for Hearing which lists his injuries as left foot, both legs and back. However, later in his deposition, claimant admitted that he did not tell Mr. Briggs of the back problem.²

At the request of his attorney, claimant was examined by Dr. C. Reiff Brown in Dodge City, Kansas, on January 6, 2010. Dr. Brown examined and evaluated only claimant's left lower leg, ankle and foot. His opinion was that claimant suffered a contusion, possible left ankle sprain and possible fracture of the cuneiform bone or tibia. Dr. Brown recommended that claimant be seen by an orthopedic surgeon who would likely order further tests. He also felt physical therapy would be helpful. Dr. Brown testified there was nothing recorded in his report about claimant's low back. He indicated that he would not have ignored a low back complaint by claimant.

Claimant testified he reported his back injury to Dr. Brown. Claimant testified that when he went to see Dr. Brown, the interpreter his attorney hired failed to appear. According to Dr. Brown, an employee for another doctor initially served as an interpreter. Claimant's daughter, Mayra Cordero, was on her way to Dodge City and was asked to finish interpreting for claimant and Dr. Brown. Ms. Cordero testified that she asked Dr. Brown, at the request of her father, to examine his back. According to Ms. Cordero, Dr.

¹ Pedro Cordero Depo. at 20-21.

² *Id.*, at 21.

Brown refused because “. . . he wasn’t supposed to check on his back because it wasn’t on his papers.”³

At the request of respondent’s insurance carrier, claimant saw Dr. Guillermo Garcia, an orthopedic surgeon, on April 29 and May 13, 2010. He indicated that he speaks Spanish fluently and had no problems communicating with claimant. Dr. Garcia testified that at the April 29, 2010, appointment, claimant complained of continued swelling on the left foot and a slight limited range of motion of the left ankle, which was uncomfortable. Dr. Garcia’s report from that visit does not indicate claimant complained of back pain. He also testified that he did not recall claimant making any complaint of back pain during the April 29, 2010, appointment. Dr. Garcia ordered a CT scan of claimant’s ankle.

At the May 13, 2010, visit, Dr. Garcia again examined claimant. Dr. Garcia testified claimant made no complaints about his back during this appointment. According to Dr. Garcia, the ankle CT scan results were completely normal. In his report of May 13, 2010, Dr. Garcia opined claimant could go back to work with no restrictions and had no disability.⁴

Dr. Garcia acknowledged he did not have a specific recollection of claimant. Dr. Garcia indicated if a worker is referred to him by the employer for a foot problem and complained of a painful back, he would tell that worker to go back to the employer to obtain permission to see another doctor who treats backs. When a situation like this arises, Dr. Garcia does not make a notation in his records.⁵

At the request of his attorney, claimant was examined by Dr. Pedro A. Murati on June 22, 2010. Dr. Murati reviewed the medical records from Western Plains and Dr. Brown, but not the records of Dr. Garcia. Nor did he review any radiological films of claimant. Dr. Murati noted in his report that claimant made four complaints: (1) numbness and tingling that shoots into both toes; (2) cannot stand or sit for long periods of time without pain in legs, left foot and lower back; (3) claimant needs assistance when standing up after sitting too long because he is so stiff he cannot get up on his own; and (4) claimant has to take a lot of breaks while walking because he gets so tired. Dr. Murati testified that claimant reported his back began hurting two or three days after the accident. Claimant told Dr. Murati about reporting the back injury to Mr. Briggs and Drs. Brown and Garcia.

Dr. Murati’s examination of claimant revealed missing bilateral jerk reflexes and a depressed left knee reflex. According to Dr. Murati these are objective findings consistent with radiculopathy. A sensory examination to pinprick for the bilateral lower extremities revealed a decrease in sensation along the left S1 dermatome, which is an objective

³ Mayra Cordero Depo. at 7.

⁴ Garcia Depo., Ex. 2.

⁵ *Id.*, at 14-15.

finding of radiculopathy. Claimant's S1 spinous process was tender, and there was an increased tone of the left lumbosacral paraspinals, which is a sign of spasm on that side. On cross-examination, Dr. Murati admitted his diagnostic impression of radiculopathy was not confirmed by any EMG or nerve conduction studies. Dr. Murati indicated claimant had a mild antalgic gait which could prevent the back injury from healing. Dr. Murati opined that within a reasonable degree of medical probability, claimant's back condition was causally related to claimant's fall at work.

Dr. Murati's impression was that claimant had low back pain with signs and symptoms of radiculopathy; left 2nd, 3rd and 4th metatarsalgia; and left plantar fasciitis. He opined that according to the *Guides*,⁶ claimant had a 10% functional impairment to the body as a whole for his low back pain. Dr. Murati indicated claimant falls under Lumbosacral DRE Category III. For claimant's left lower extremity, Dr. Murati assigned the following impairments: (1) 5% for left plantar fasciitis, (2) 2% for the left second metatarsalgia, (3) 2% for the left third metatarsalgia, and (4) 2% for the left fourth metatarsalgia. These combine for an 11% impairment to the left lower extremity, which converts to a 4% permanent impairment to the body as a whole. The lower extremity and back impairments combine for a 14% whole person impairment.

Claimant was assigned significant restrictions by Dr. Murati, including no bending, crouching, stooping, climbing ladders, squatting, crawling or use of repetitive foot controls on the left. Claimant was not to try driving a manual transmission motor vehicle. He was to climb stairs only rarely, and limit sitting, standing, walking and driving to occasionally. Claimant was restricted to lifting, carrying, pushing or pulling: (1) never greater than ten pounds; (2) ten pounds or less occasionally; and (3) five pounds or less frequently. Claimant also was to alternate sitting, standing and walking.

On September 17, 2010, the ALJ issued an Order appointing Dr. Terrence Pratt to perform an independent evaluation of claimant. That evaluation was conducted on November 5, 2010. Claimant reported discomfort involving the low back and left ankle. His back symptoms began one week after the fall. Claimant recalled seeing three physicians, but did not recall their names. The first thought he had a broken left ankle, but changed that diagnosis to a sprained left ankle after x-rays were taken. The second doctor told him he had back pain. Dr. Pratt was told by claimant that he did not tell all the doctors he saw about having back pain.

Dr. Pratt reviewed the records from Western Plains and Drs. Brown, Garcia and Murati, but did not review any radiographic studies. His impression was a history of contusion with left ankle/foot discomfort and low back pain. He opined claimant had a 3%

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent impairment as a result of limitations with the eversion to ten degrees on the left foot and 3% for claimant's foot and toe involvement as well as ankle involvement initially. These combine for a 6% permanent impairment to the left foot. Dr. Pratt could not within a reasonable degree of medical probability relate claimant's back problems to his work-related accident.

In a letter dated December 15, 2010, to Dr. Pratt, claimant's attorney asked Dr. Pratt if his opinion concerning causation of claimant's back injury would be different if: (1) Dr. Brown failed to evaluate/examine claimant's back complaints despite instructions to do so and (2) Dr. Garcia did not evaluate/examine claimant's back complaints because he was limited to evaluating claimant's left foot and leg. Dr. Pratt then replied in a letter dated December 27, 2010, that if claimant made complaints of back pain to Drs. Brown and Garcia, his opinion would change. He testified that his opinion would then be that there was a direct relationship between claimant's low back injury and the accident. Utilizing the *Guides*, Dr. Pratt gave claimant a 5% permanent whole body impairment for the low back injury and placed him in DRE Category II for involvement of the lumbosacral region.

When Dr. Pratt examined claimant, a reverse straight leg raising on the left and a straight leg raising on the left and right were positive for back complaints. Dr. Pratt testified he did not associate these complaints with the accident because of the lack of documentation of lumbosacral involvement. Dr. Pratt indicated he observed claimant with an antalgic gait. He testified that a person who limps for an extended time can cause back pain or can aggravate or accelerate an existing back condition. If claimant sustained a low back injury as a result of his October 2009 accident, Dr. Pratt recommended restrictions limiting frequent low back bending or twisting, but claimant could lift whatever weights he felt appropriate.

In her Award, ALJ Fuller indicated she was adopting the opinions of Dr. Pratt and found claimant had a 5% permanent impairment to the body as a whole for involvement of the lumbar region and a 6% permanent impairment to the foot (2% whole body) which combine for a 7% impairment to the body as a whole. The ALJ discussed at length what claimant did or did not tell Mr. Briggs and Drs. Brown, Garcia, Murati and Pratt about his back condition. Finally, the ALJ concluded claimant was not entitled to a work disability because he did not have the legal status necessary to be employed in the United States.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a)(14) allows a claimant a maximum of 125 weeks of permanent partial disability benefits for the loss of a foot and K.S.A. 44-510d(a)(15) allows a claimant a maximum of 190 weeks of permanent partial disability benefits for the loss of a lower leg. K.A.R. 51-7-8(c)(1) provides that an injury to the metatarsals shall be considered an injury to the foot.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.⁷

ANALYSIS

Dr. Pratt opined claimant had a 3% permanent impairment as a result of limitations with the eversion to ten degrees on the left foot and 3% for claimant's foot and toe involvement as well as ankle involvement initially. These combine for a 6% permanent impairment to the left foot. Dr. Murati assigned the following impairments for claimant's left lower extremity: (1) 5% for left plantar fasciitis, (2) 2% for the left second metatarsalgia, (3) 2% for the left third metatarsalgia, and (4) 2% for the left fourth metatarsalgia. Dr. Murati indicated these combine for an 11% impairment to the left lower extremity. The permanent impairments that Drs. Pratt and Murati assigned to claimant's left lower extremity are limited to his left foot. Therefore, the Board finds claimant has a 6% permanent impairment to the left foot.

The Board finds that claimant failed to prove by a preponderance of the evidence that his low back condition arose out of and in the course of his employment with respondent. Claimant asserts that he suffered a permanent impairment to the body as a whole as a result of a lumbar injury. He alleged that his low back pain began two to three days after the accident on October 9, 2009. Because claimant was afraid of losing his job, he did not report the back injury to Mr. Bramwell. Initially, claimant said he told Mr. Briggs about the back injury, but later he recanted.

Claimant testified he reported his back problems to Dr. Brown. However, Dr. Brown's testimony does not support this assertion by claimant. Dr. Brown testified that he would not have ignored a low back complaint by claimant. Dr. Brown, who was hired by claimant's attorney, is an experienced orthopedic doctor who has examined innumerable claimants and testifies regularly in workers compensation claims. He likely would not have ignored a complaint of back pain by claimant.

⁷ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

Dr. Garcia indicated if a worker is referred to him by the employer for a foot problem and complained of a painful back, he would tell that worker to go back to the employer to obtain permission to see another doctor who treats backs. When a situation like this arises, he does not make a notation in his records. Claimant testified that he told Dr. Garcia about his back injury. If Dr. Garcia told claimant to go back to his employer and request treatment for his back, there was no evidence presented that claimant did so.

The first medical record that mentions a back injury was the June 22, 2010, report of Dr. Murati. This was over eight months after claimant's accident on October 9, 2009. Dr. Pratt's impression was that claimant had low back pain, but the doctor could not within a reasonable degree of medical probability relate the low back pain to claimant's accident on October 9, 2009. Dr. Pratt indicated his opinion concerning causation would change if he assumed Dr. Brown failed to examine claimant's back and that Dr. Garcia refused to do so. If Dr. Pratt made those assumptions, then he would opine there was a direct relationship between claimant's accident and his low back injury.

In order to find that claimant's back injury was causally related to his October 9, 2009, accident, one has to assume claimant made complaints of back problems to Drs. Brown and Garcia. Claimant presented insufficient evidence to prove that he complained of back problems to those physicians. In coming to this conclusion, the Board is mindful claimant purposefully did not tell Dana Bramwell or Danny Briggs about having back pain. Therefore, the Board adopts the initial opinion of Dr. Pratt that he could not within a reasonable degree of medical probability relate the low back pain to claimant's accident on October 9, 2009.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Claimant sustained a 6% permanent impairment to the left foot.
2. Claimant failed to prove by a preponderance of the evidence that he sustained a lumbar injury by accident on October 9, 2009, arising out of and in the course of his employment with respondent.

The issue of whether claimant is entitled to work disability benefits is moot.

⁸ K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the October 19, 2011, Award entered by ALJ Fuller.

Pedro Cordero is granted compensation from National Carriers, Inc., and its insurance carrier for an October 9, 2009, accident and resulting disability. Based upon an average weekly wage of \$667.45, Mr. Cordero is entitled to receive 7.5 weeks of permanent partial disability benefits at \$444.99 per week, or \$3,337.43, for a 6% permanent partial disability, making a total award of \$3,337.43, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders of the ALJ in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge